

Institute for Public Representation

Georgetown Law
600 New Jersey Ave. NW
Washington, DC 20001
202.662.9535 (phone)
202.662.9634 (fax)



April 17, 2013

via certified mail, e-mail, and electronic filing

Susan Kimmel, Deputy Chief, Disability Rights Office
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Informal Complaint Alleging Violation of the Commission's Internet Protocol
Closed Captioning Rules by Amazon.com, Inc.
Complaint # 12-C00454509-1**

Dear Ms. Kimmel:

Telecommunications for the Deaf and Hard of Hearing Inc. (TDI), the National Association of the Deaf (NAD), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the Association of Late-Deafened Adults (ALDA), the Hearing Loss Association of America (HLAA), the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," respectfully submit this response to the February 14, 2013 letter from Amazon.com, Inc ("Amazon") responding to our December 20, 2012 informal complaint alleging violations of the Commission's Internet Protocol ("IP") closed captioning rules, 47 C.F.R. § 79.4.¹

¹ Informal Complaint of TDI, et al. (Dec. 20, 2012) ("*Consumer Groups Complaint*"); Letter from Gerard J. Waldron and Lindsey L. Tonsager, Counsel for Amazon.com, Inc., to the Consumer and Governmental Affairs Bureau (Feb. 14, 2013) ("*Amazon Response*").

Because Amazon's response admits to numerous violations of the rules without cognizable justification or excuse, and because Amazon has continued to violate the rules since filing its response, we again recommend that the Commission issue the maximum possible forfeiture against Amazon, grant injunctive relief requiring Amazon to immediately comply with the IP closed captioning rules, and establish daily base forfeitures for subsequent violations of the rules by Amazon.² In light of Amazon's allegation that many of its unidentified video programming owner ("VPO") partners are routinely failing to provide required, non-erroneous captions, we also urge the Commission to require Amazon to immediately disclose the identities and contact information of its noncompliant VPO partners. Finally, the Commission should require Amazon to proactively disclose future noncompliance and identify noncompliant VPO partners to the Commission.

On December 20, 2012, Consumer Groups filed a complaint pursuant to Rule 79.4(e) alleging that Amazon repeatedly violated Rule 79.4(b)(1) and (c)(2)(i).³ The complaint alleged that Amazon failed to enable the rendering or pass through of required captions for periods as long as 23 days.⁴ We based our complaint on hundreds of observations of missing captions in 43 out of a sample of 66 video programs subject to the IP captioning rules.⁵ In the complaint, we urged the Commission to hold Amazon liable for the repeated violations of the IP captioning rules, which we believed demonstrated a pattern of willful and brazen noncompliance.⁶

² See *Consumer Groups Complaint* at 1.

³ See generally *id.*

⁴ *Id.* at 4.

⁵ Although our complaint included observations of missing captions in 49 out of 72 programs delivered by Amazon, Amazon contends that six observed episodes of *American Choppers* originally aired before September 30, 2012 and thus were not subject to the rules. See *Amazon Response* at 13.

⁶ *Consumer Groups Complaint* at 5-6.

Amazon's February 14, 2013 response to our complaint confirms our initial observation that Amazon delivered 43 of the 66 programs subject to the IP captioning rules without captions for varying periods of time.⁷ Amazon admits to delivering four of the programs uncaptioned without offering any excuse, explanation, or reason.⁸ Amazon also does not deny that it delivered a fifth program uncaptioned, merely noting that captions "should have been available."⁹ These five unexcused violations alone should constitute sufficient grounds for the Commission to impose substantial sanctions against Amazon.

Amazon also admits that it delivered the remaining 38 programs without captions. But instead of taking responsibility for violating the civil rights of its deaf and hard of hearing customers under the Commission's rules and the Twenty-First Century Communications and Video Accessibility Act ("CVAA"), Amazon offers a litany of baseless excuses for failing to deliver programming with required captions.¹⁰ More specifically, Amazon argues:

- That video programming need not be delivered with captions immediately upon release;
- That systemic, multi-day delays in delivering captions are merely *de minimis* violations of the IP captioning rules;
- That video programming distributors ("VPDs") can ignore widespread failures by their VPO partners to provide required, non-erroneous captions;
- That *admitted* violations of the IP captioning rules are not actionable simply because they occur outside the time frame for a consumer complaint;

⁷ See *Consumer Groups Complaint* at 4.

⁸ See *Amazon Response* at 12 (*Switched at Birth*, Season 1, Episodes 28, 29, and 30, and *Breaking Amish*, Season 1, Episode 8).

⁹ *Amazon Response* at 12 (*Hoarders*, Season 6, Episode 3).

¹⁰ See Pub. L. No. 111-260, 124 Stat. 2751 (2010).

- That VPDs need not comply with Commission rules as of their effective date; and
- That the Commission should excuse Amazon's violations because Amazon has taken remedial action to comply with the rules.

We urge the Commission to reject Amazon's patchwork of legally unfounded excuses, which simply amount to an invitation for the Commission not to enforce its rules and the clear requirements of the CVAA in the face of widespread, well-documented violations. The CVAA, the *IP Captioning Order* and the Commission's rules make clear that Amazon is obliged to provide captions each and every time it delivers a covered program to one of its customers. Amazon's systemic and repeated failures to do so constitute unambiguous violations of the rules that cannot reasonably be excused as *de minimis*, blamed on Amazon's unidentified VPO partners, ignored because they occurred outside the Commission's complaint time frame, or justified by Amazon's failure to diligently prepare its systems for compliance in advance of the effective date of the rules.

Finally, Amazon's insistence that enforcement action is unnecessary because it has resolved its initial problems with IP captioning stand in stark contrast to its continuing violations of the rules following its response to our complaint. A recent review of a sample of Amazon's programming response again revealed numerous failures to provide required captions on a timely basis.¹¹

A failure to hold Amazon accountable for its continued noncompliance would risk signaling to Amazon and other VPDs that they can openly violate the IP captioning rules with impunity – in stark contravention of Congress' intent in enacting the CVAA. Accordingly, we urge the Commission to immediately refer this matter to the Enforcement Bureau for the prompt imposition of sanctions.

¹¹ See discussion *infra*, Part VI.

I. The IP captioning rules require Amazon to enable the rendering or pass through of captions each and every time it delivers a covered program.

Amazon excuses several of its failures to provide required captions on the grounds that it is not required to provide captions immediately upon making covered, non-archival video programming available for delivery via IP.¹² More specifically, Amazon contends that “[n]othing in the text of the rules explicitly requires that a VPD make captions available to an end user at the same instant that video programming is made available online.”¹³

Amazon’s reasoning is plainly inconsistent with the *IP Captioning Order*. As Amazon concedes, the *IP Captioning Order* specifically requires that “[o]nce a deadline has been reached for a particular category of programming, the content must be captioned *immediately* when delivered via IP”¹⁴

Amazon nevertheless contends that this clear guidance is inapplicable to VPDs because it is a “single sentence from a different section of the [Order].”¹⁵ Amazon fails to explain why a critical statement of Commission policy should be ignored simply because it spans only a single sentence. Regardless, the subsequent sentence in the

¹² *Amazon Response* at 6-8. Amazon insists that delays were necessary because of technical errors in caption files delivered by VPOs, such as misnamed, miscoded, or uncoded files, which Amazon contends require a “time- and labor-intensive” process to fix. *Id.* at 6-7. We are skeptical that a process as simple as renaming a file could warrant a multi-day delay in the provision of captions. Our complaint also noted that many programs delivered by Amazon without captions were properly captioned by other VPDs, suggesting that delays were attributable to Amazon and not VPOs. *Consumer Groups Complaint* at 4-5, n.3. Regardless, if Amazon believes that the fault for delays in captions lies with its VPO partners, Amazon committed a separate violation of the rules by failing to identify the VPOs it believes are responsible. See discussion *infra*, Part III.

¹³ *Amazon Response* at 8.

¹⁴ *Closed Captioning of Internet Protocol-Delivered Video Programming, Report and Order*, MB Docket No. 11-154, 27 FCC Rcd. 787, 820, ¶ 51 (Jan. 13, 2012) (“*IP Captioning Order*”) (emphasis added), quoted in *Amazon Response* at 8-9.

¹⁵ *Amazon Response* at 8.

Order reinforces the previous one, explaining that “[o]nce the applicable deadline has been reached for a certain program, VPOs and VPDs must fulfill their responsibilities to ensure that the program has captions *when delivered* to end users via IP.”¹⁶

Amazon also fails to explain precisely what it means when it says the section from which the Commission’s guiding language is quoted is “different,” nor why Amazon apparently believes a section entitled “Compliance Deadlines” is irrelevant to determining whether Amazon complied with its obligations on a timely basis.¹⁷ Indeed, Amazon later concedes that “[t]he quoted language is intended to enumerate the different dates by which . . . programming *become[s] subject to the Commission’s IP closed captioning rules.*”¹⁸

Regardless, the Commission’s obvious intent that VPDs provide captions immediately upon making programs available to end users is reinforced in a previous section entitled “*Video programming distributor or provider responsibilities,*” where the Commission clarifies that “[w]hen a VPD initially receives a program with required captions for IP delivery, we will require the VPD to include those captions *at the time it makes the program file available to end users.*”¹⁹

Indeed, Amazon “does not dispute that the rules for specific types of video programming take effect *immediately* upon specified dates [in Rule 79.4(b)]” and concedes that “Amazon, as a VPD, has an obligation to pass through or render . . . captions” provided by a VPO.²⁰ Amazon nevertheless contends that it need only make captions available to its customers within a “reasonable period of time.”²¹

¹⁶ *IP Captioning Order*, 27 FCC Rcd. at 820, ¶ 51 (emphasis added, internal citation omitted).

¹⁷ See *id.* at 819.

¹⁸ *Amazon Response* at 9 (emphasis added).

¹⁹ *IP Captioning Order*, 27 FCC Rcd. at 804-05, ¶ 26.

²⁰ See *Amazon Response* at 9 (emphasis added).

²¹ *Id.*

Amazon tellingly offers no citation for the proposition that it can deliver non-archival programming without captions for a “reasonable period of time” — a concept that appears nowhere in the IP captioning rules and is plainly contradicted by the rules’ clear operation.²² Rule 79.4(b) requires covered programming to be “provided with closed captions” each and every time it is “delivered.”²³ Each and every time a VPD “deliver[s]” a covered, non-archival program to a customer, the VPD must enable the rendering or pass through of captions pursuant to its obligations under Rule 79.4(c)(2)(i).²⁴ Thus, any “deliver[y]” of a covered, non-archival program without required captions by a VPD plainly violates Rule 79.4(b) and (c)(2)(i).

If the Commission had intended to afford VPDs the ability to wait for a “reasonable period of time” during which they could deliver covered programs without captions, it no doubt would have done so explicitly. Indeed, Rule 79.4(b)(4) affords VPDs a specific grace period for the uncaptioned delivery of covered *archival* programming — programming that is already in a VPD’s library before being published or exhibited on television with captions.²⁵ But no such grace period appears in the rules’ *non-archival* provisions — Rule 79.4(b)(1), (2), and (3) — making clear that the Commission did not intend a grace period for covered non-archival programming.²⁶

Moreover, the *IP Captioning Order* makes clear that there is no “reasonable period of time” for delivering non-archival programming without captions, noting that “[o]nce

²² Amazon contends that it may permissibly delay the provision of captions for the purpose of improving their quality. *Amazon Response* at 8. While the *IP Captioning Order* sensibly encourages VPDs to improve the quality of captions, nothing in the *Order* suggests that improving quality is a permissible justification for a VPD to shirk its basic obligation under the rules to render or pass through required captions each and every time it delivers a program to a consumer. See 27 FCC Rcd. at 814, ¶ 39.

²³ See 47 C.F.R. § 79.4(b).

²⁴ See 47 C.F.R. § 79.4(b), (c)(2)(i).

²⁵ 47 C.F.R. § 79.1(b)(4).

²⁶ See 47 C.F.R. § 79.1(b)(1)-(3).

a deadline has been reached for a particular category of programming, the content must be captioned immediately when delivered via IP, *with the exception of updates to content already in a VPD's library.*"²⁷ In fact, the term "reasonable period of time" is mentioned in only one paragraph out of the 135 paragraphs of the *IP Captioning Order*: the paragraph explaining the operation of the grace period for archival programming, which specifically defines the length of the period.²⁸

Amazon does not dispute that the programming at issue was subject to Rule 79.4(b)(1) and not eligible for the grace period for archival programming in Rule 79.4(b)(4).²⁹ Therefore, Amazon's contention that it could permissibly deliver the programming for some unspecified "reasonable period of time" before providing captions is meritless, and Amazon plainly violated the rules each and every time it delivered covered programming without captions.

Requiring VPDs to include closed captions immediately upon making video programming available for delivery is more than just the obvious intent of the IP captioning rules. It is a critical means of realizing the civil right of deaf and hard of hearing Americans to access video programming on equal terms, as required by the CVAA. Amazon's delayed provision of captions denies its deaf and hard of hearing customers the ability to watch new programs at the same time as hearing people and engage in the cultural, democratic and participatory discourse surrounding video programming. Permitting Amazon to continue this practice would sanction its treatment of its deaf and hard of hearing customers as second-class citizens, and we urge the Commission to repudiate Amazon's exercise in unlawful discrimination.

²⁷ *IP Captioning Order*, 27 FCC Rcd. at 820, ¶ 51.

²⁸ See *id.* at 809-10, ¶ 34.

²⁹ See *Consumer Groups Complaint* at 2-3.

II. Amazon’s systemic delivery of covered programs without required captions was not *de minimis*.

Amazon argues that several of its failures to provide captions for various programming – for up to four days – were *de minimis* under the meaning of Rule 79.4(c)(3) and thus did not violate the IP captioning rules.³⁰ More specifically, Amazon insists that “a delay ranging from a few hours to a few days that fell over a weekend for a small number of titles is reasonable under any circumstances.”³¹

Amazon’s conclusory argument is unsupported by any facts suggesting that the circumstances surrounding its repeated and unexplained failures to provide programming with required captions for days at a time could possibly qualify as *de minimis*. A VPD’s failure to provide required captions immediately must be treated as a violation of the rules unless the VPD provides *specific evidence* that demonstrates that failure “was *de minimis* and reasonable under the circumstances.”³² In particular, a VPD claiming that its failure to caption is *de minimis* must describe “the particular circumstances of the failure to comply, including the type of failure, the reason for the failure, whether the failure was one-time or continuing, and the time frame within which the failure was remedied.”³³

Amazon blithely suggests that its multi-day failures to provide captions were *de minimis* because they “fell over a weekend.”³⁴ But Amazon offers no explanation for why it faces any more difficulty in providing required captions for covered

³⁰ See 47 C.F.R. § 79.4(c)(3); *Amazon Response* at 10.

³¹ *Id.* at 10.

³² See *IP Captioning Order*, 27 FCC Rcd. at 831, ¶ 73 (quoting *Closed Captioning and Video Description of Video Programming, Order on Reconsideration*, 13 FCC Rcd. 19,973, 19,979, ¶ 10 (1998)).

³³ See *id.* at 830, ¶¶ 72-73 (quoting *Closed Captioning of Internet Protocol-Delivered Video Programming, Notice of Proposed Rulemaking*, MB Docket No. 11-154, 26 FCC Rcd. 13734, 13755-56, ¶ 41 (2011)).

³⁴ See *Amazon Response* at 10.

programming over the weekend than during the rest of the week. Nor does Amazon explain why any such difficulty could excuse it from immediate compliance with the rules.³⁵ The civil right of deaf and hard of hearing Americans to access video programming on equal terms is in effect seven days a week, and Amazon cannot offer any citation to the CVAA, the *IP Captioning Order*, or the IP captioning rules plausibly suggesting that the Commission should reach a contrary conclusion.

Amazon also contends that its failures to provide captions were *de minimis* because they occurred over a “small number of titles.”³⁶ But just as “no plagiarist can excuse the wrong by showing how much of his work he did not pirate,” Amazon cannot excuse individual violations of the rules simply by touting its compliance on other occasions.³⁷ Even a single failure to provide required captions constitutes an actionable violation of the rules absent the presence of extenuating circumstances that warrant treating the violation as *de minimis*.

In any case, Amazon failed to provide required captions on 43 out of a sample of 66 covered programs subject to the rules—a 65% failure rate on just the small sample of programs reviewed in the complaint. Amazon offers no evidence to rebut the likelihood that the captioning problems in the sample are representative of similar problems in the remainder of Amazon’s programming library. In fact, further testing following Amazon’s response revealed even more uncaptioned programming.³⁸ To whatever extent the Commission might choose to treat isolated and quickly remedied captioning failures as *de minimis*, there are no circumstances suggesting that Amazon’s widespread and systemic failures qualify as such.

³⁵ See discussion *supra*, Part I.

³⁶ *Amazon Response* at 10.

³⁷ Cf. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936).

³⁸ See discussion *infra*, Part VI.

Instead of cogently identifying any specific circumstances that might have excused its failures to provide required captioning as *de minimis*, Amazon essentially insists that it can deliver covered programming without required captions for up to four days as a matter of course – without any legitimate reason or justification for doing so. We urge the Commission to reject this argument and make clear that the immediate provision of required captions is the rule, not the exception.

III. Amazon’s knowing delivery of covered programs provided by VPOs with missing or erroneous captions requires identification of those VPOs.

Amazon argues that it should not be liable for the uncaptioned delivery of numerous covered programs that it allegedly received from VPOs with missing or erroneous captions.³⁹ In general, Amazon argues that it “should not be liable for the failure to deliver required captions when that failure is caused by a VPO.”⁴⁰

At the outset, we agree with Amazon’s apparent concession that its VPO partners violated the rules by failing to deliver covered programming with required captions. Rule 79.4(c)(1)(i) requires VPOs to “[s]end program files to video programming distributors and providers with [required] captions . . . , with at least the same quality as the television captions provided for the same programming.”⁴¹ Any VPO who delivers a covered program without required captions at a level of quality at least equivalent to the corresponding television captions plainly violates Rule 79.4(b) and (c)(1)(i).

Unfortunately, Amazon’s response fails to identify any VPO specifically responsible for failing to provide required captions with sufficient quality for the covered programming described in our complaint. While the *IP Captioning Order*

³⁹ *Amazon Response* at 4-6, 6-8.

⁴⁰ *Id.*

⁴¹ 47 C.F.R. § 79.4(c)(1)(i).

permits a VPD to respond to a consumer complaint by stating that the problems in the complaint are attributable to a VPO, it also makes clear that the VPD must specifically “indicate the identity and contact information of the VPO” that the VPD believes is responsible for the failure.⁴²

Several of the Consumer Groups noted in our comments during the rulemaking preceding the *IP Captioning Order* concern over potential difficulties in identifying and sanctioning noncompliant VPOs.⁴³ In specific response to these concerns, the Commission agreed that it would “require VPDs to provide information on the VPO’s identity if the VPD claims that the captioning problem was the fault of the VPO.”⁴⁴

Amazon’s failure to identify the parties it blames for its failure to deliver programs with required captions unduly hinders and delays the Commission’s ability to conduct a proper investigation and seek enforcement, and arguably constitutes a separate violation of the rules.⁴⁵ At a minimum, Amazon must immediately identify all VPOs it believes to be at fault for providing programs without required captions.

Even more troubling than Amazon’s failure to identify responsible VPOs, however, is Amazon’s tacit admission that it knowingly and systemically delivers covered video programs with missing or erroneous captions. Amazon admits that during the time period covered by the complaint, only 17 out of 52 — *less than one third* — of Amazon’s VPO partners provided all of their programs with required captions in a timely fashion.⁴⁶ Amazon highlights one VPO that provided required captions for only

⁴² *IP Captioning Order*, 27 FCC Rcd. at 834, ¶ 82.

⁴³ *Id.* at 799, ¶ 18.

⁴⁴ *Id.*

⁴⁵ See 47 C.F.R. § 79.4(e)(5) (“In response to a complaint, video programming distributors . . . shall file with the Commission sufficient records and documentation to prove that the responding entity was (and remains) in compliance with the Commission’s rules.”).

⁴⁶ *Amazon Response* at 4-5.

seven percent of its covered programming.⁴⁷ Amazon even suggests that technical errors in VPO-delivered caption files are so pervasive that Amazon no longer undertakes the process of conducting quality assurance for captions before making programming available for delivery.⁴⁸

The Commission's decision to divide responsibility for the closed captioning of IP-delivered programs between VPDs and VPOs was not intended to permit VPDs to willfully ignore pervasive noncompliance by their VPO partners. Rule 79.4(c)(2)(ii) obligates a VPD to "agree upon a mechanism [with each partnering VPO] to inform [the VPD] or provider on an ongoing basis whether video programming is subject to the [IP captioning rules], and *make a good faith effort to identify video programming subject to the requirements of this section* using the agreed upon mechanism."⁴⁹

Amazon's systemic delivery of programs it knows are covered by the IP captioning rules with missing or erroneous captions violates the spirit, if not the letter, of Amazon's obligations to act in good faith under Rule 79.4(c)(2)(ii). To remedy this violation, we urge the Commission to require Amazon to proactively, immediately, and publicly disclose all observed VPO noncompliance to the Commission for a period of at least one year.

IV. Amazon is liable for admitted violations of the rules regardless of when they occurred.

Amazon claims that it should not face liability for violations of the rules that occurred more than 60 days prior to the filing of our complaint.⁵⁰ Of course, our complaint made clear that it was directed only toward violations that occurred within

⁴⁷ *Id.* at 5.

⁴⁸ *See id.* at 6.

⁴⁹ 47 C.F.R. § 79.4(c)(2)(ii).

⁵⁰ *See Amazon Response* at 14.

60 days prior to its filing.⁵¹ We specifically noted that any documentation of earlier violations of the rules was solely to aid the Commission's investigation and imposition of sanctions.⁵²

Nevertheless, Amazon's response *admits* that it delivered numerous programs without required captions more than 60 days prior to the filing of our complaint.⁵³ More specifically, Amazon concedes that there was a "delay" in the provision of captions for 24 separate covered programs delivered more than 60 days prior to the complaint.⁵⁴

While Rule 79.4(e)(1) imposes a 60-day time frame for consumers to file complaints, it is not a statute of limitations and cannot excuse *admitted* violations of the rules where the facts underlying the violation are not in dispute. As the Commission noted in the *IP Captioning Order*, the 60-day time frame is simply meant to ensure that "evidence available at the time of the complaint remains fresh" and that "evidence is available to adjudicate the complaint properly."⁵⁵ Even Amazon concedes that the sole purpose of the time frame is to afford VPDs "a fair opportunity to *rebut a complainant's allegations*."⁵⁶

When a VPD *admits* to delivering programs without required captions, it disclaims any concern over the spoliation of evidence of its violations and any interest in rebutting the factual circumstances constituting the legal violation. Accordingly, the 60-day time frame of Rule 79.4(e)(1) is inoperative and irrelevant when a VPD admits to delivering programming without captions in violation of the rules. Because Amazon specifically admits that it delivered the programs in question without required captions,

⁵¹ *Consumer Groups Complaint* at 7, n.11.

⁵² *Id.*

⁵³ *Amazon Response* at 14-15 & n.21.

⁵⁴ *Id.*

⁵⁵ *IP Captioning Order*, 27 FCC Rcd. at 832-33, ¶¶ 76-78.

⁵⁶ *Amazon Response* at 14 (citing *IP Captioning Order*, 27 FCC Rcd. at 832-33, ¶¶ 77-78) (emphasis added).

the Commission can and should act *sua sponte* to hold Amazon accountable for admitted violations of the rules that were not the subject of our complaint.

Even assuming for the sake of argument that Amazon's violations of the rules more than 60 days prior to the filing of our complaint were excusable under Rule 79.4(e)(1), Amazon concedes that 18 of the 24 covered programs delivered without required captions were also delivered without captions *within* 60 days of the complaint.⁵⁷ The Commission specifically noted in the *IP Captioning Order* that consumers need only "file a complaint within 60 days of *any date* on which the consumer accessed the programming and did not receive compliant captions."⁵⁸

That a consumer does not file a complaint within 60 days of initially observing an observation is irrelevant because "problems with captions of IP-delivered video programming often may be ongoing, in that a program may remain online without captions for a period of time."⁵⁹ Accordingly, Rule 79.4(e)(1) cannot under any circumstances relieve Amazon of liability for failing to deliver programs with required captions both during *and* before the 60-day complaint time frame.

V. Amazon was responsible for adequately preparing to comply with the IP captioning rules before their effective date.

More generally, Amazon blames many of its failures to deliver covered programming with required captions on its inability to prepare their systems to accommodate captioning in advance of the effective date of the Commission's rules.⁶⁰ Amazon cites to various unexplained and largely undocumented "technical problems," "technical glitches," "technical errors," "technical delays," "deficiencies," "challenges,"

⁵⁷ See *id.* at 14-15, n.21.

⁵⁸ *IP Captioning Order*, 27 FCC at 832, ¶ 77 (emphasis added).

⁵⁹ See *id.*

⁶⁰ See *Amazon Response* at 3, 5, 6-10, 11-12.

employee “unfamiliar[ity] with [Amazon’s] new captioning tools and procedures,” “pipeline ingestion errors,” and “internal processing errors.”⁶¹

Amazon’s tale of diligently struggling in good faith to overcome unpredictable difficulties in initially complying with the IP captioning rules does not square with Amazon’s public image as a global leader in rapid technology deployment.⁶² A 2011 *Forbes* profile singled out Amazon as “The Best Strategic Player in Tech,” lauding Amazon as the “General Electric of our times.”⁶³ Amazon’s Chief Technology Officer Werner Vogels recently bragged that Amazon’s technical infrastructure is set up specifically for market-leading deployment speed, with up to 800 internal teams prepared to bring technology products to market in less than 15 days.⁶⁴

On top of its industry-leading agility and technical capacity, Amazon had nearly three years to prepare for compliance with the IP captioning rules after President Obama signed the CVAA into law on October 8, 2010. Amazon even had a hand in shaping the contours of the rules through the participation of its trade association, the Digital Media Association (“DiMA”), in the Video Programming Accessibility Advisory Committee (“VPAAC”).⁶⁵ The Media Bureau specifically acknowledged that “VPDs have been aware of the [caption] rendering requirement since Congress passed the CVAA” in denying DiMA’s petition to delay the effective date of the rules.⁶⁶

⁶¹ See *id.* at 3, 10-12

⁶² See *id.* at 2.

⁶³ Venkatesh Rao, *Why Amazon is the Best Strategic Player in Tech*, *Forbes* (Dec. 14, 2011), <http://www.forbes.com/sites/venkateshrao/2011/12/14/the-amazon-playbook/>.

⁶⁴ Brad McCarty, *Amazon’s CTO: “Amazon is a technology company. We just happen to do retail,”* *The Next Web* (Oct. 5, 2011), <http://thenextweb.com/insider/2011/10/05/amazons-cto-amazon-is-a-technology-company-we-just-happen-to-do-retail/>

⁶⁵ See *Consumer Groups Complaint* at 5-6.

⁶⁶ *Closed Captioning of Internet Protocol-Delivered Video Programming, Petitions for Temporary Partial Exemption or Limited Waiver*, MB Docket No. 11-154, 27 FCC Rcd. 9630, 9638-39, ¶ 16 (August 17, 2012).

Amazon's claim that it could not competently implement simple closed captioning functionality – despite having years to do so and a vast wellspring of technological expertise – defies all credibility. Amazon was well aware of the impending deadlines imposed under the CVAA and the *IP Captioning Order* and simply chose to neglect its obligations in the hope that the Commission would not take action. As Forbes notes, Amazon's *modus operandi* in the face of public failures to serve its customers is to “do the minimum necessary, wait out the storm, and move on.”⁶⁷ Such behavior is unacceptable when the civil rights of millions of deaf and hard of hearing Americans are on the line, and we urge the Commission to hold Amazon accountable for its failure to live up to the high standards of the CVAA.

VI. Amazon has failed to remedy its ongoing violations of the IP captioning rules.

In spite of its widespread violations of the IP captioning rules, Amazon argues that sanctions are unwarranted because it has taken remedial action to come into compliance. More specifically, Amazon insists that it “takes very seriously all customer concerns about deficiencies in its efforts to comply with accessibility requirements, it has made substantial progress on addressing those concerns from well before the Complaint was filed, and has already addressed the few additional issues raised in the Complaint.”⁶⁸

Our subsequent review of Amazon's captioning practices suggests that any remedies that Amazon has implemented in response to our complaint are a thin veneer over systemic problems that Amazon has failed to address. Dr. Christian Vogler of the Technology Access Program at Gallaudet University (TAP) spot-checked a small sample of covered prerecorded programs delivered by Amazon between April 6 and April 10, 2013. Dr. Vogler observed missing captions on numerous programs:

⁶⁷ See Rao, *supra* note 63.

⁶⁸ Amazon Response at 3.

Program	Season	Episode	TV Air Date	Date(s) w/CC Missing
Grimm	2	17	April 5, 2013	April 6, 2013
Tanked	4	3	April 5, 2013	April 6, 2013
The Cleveland Show	4	16	April 7, 2013	April 8, 2013
Kourtney and Kim Take Miami	5	12	April 7, 2013	April 8, 2013
Bates Motel	1	4	April 8, 2013	April 9, 2013
The Real Housewives of Beverly Hills	3	22	April 8, 2013	April 9, 2013
The Real Housewives of Orange County	8	2	April 8, 2013	April 9-10, 2013
The Real Housewives of Atlanta	5	22	April 7, 2013	April 9, 2013
LA Shrinks	1	6	April 8, 2013	April 9, 2013
Lalaloopsy	N/A	5	April 8, 2013	April 9-10, 2013
T.I. and Tiny: The Family Hustle	N/A	1	April 8, 2013	April 9, 2013

Dr. Vogler also spot-checked a small sample of live and near-live programs covered under Rule 79.4(b)(2) as of March 30, 2013. Again, Dr. Vogler observed missing captions on numerous programs:

Program	Season	Episode	TV Air Date	Date(s) w/CC Missing
The Daily Show	18	43	April 4, 2013	April 6, 2013
Reliable Sources	1	41	March 31, 2013	April 6, 2013
Fareed Zakaria GPS	1	61	March 31, 2013	April 6, 2013
NHL Games, Jets vs. Rangers	N/A	33	April 1, 2013	April 9, 2013

These additional violations indicate that whatever remedial efforts Amazon has taken since our complaint are insufficient. That Dr. Vogler was able to easily locate numerous uncaptioned covered programs again suggests that Amazon's captioning problems are the symptom of a systemic failure to take its obligations under the CVAA seriously rather than a series of isolated occurrences.

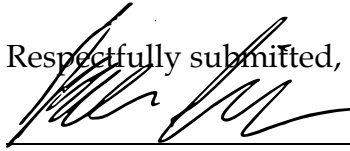
* * *

Because Amazon's response admits to its numerous, unjustifiable violations of the rules, and because Amazon has failed to take adequate remedial actions in light of our complaint, we reiterate our recommendation that the Commission issue the maximum possible forfeiture against Amazon, grant injunctive relief requiring Amazon to immediately comply with the IP closed captioning rules, and establish daily base forfeitures for subsequent violations of the rules by Amazon.⁶⁹ We also urge the Commission to investigate Amazon's claims of widespread noncompliance by its VPO partners. As part of its sanctions against Amazon, the Commission should require Amazon to disclose the identities and contact information of its noncompliant VPOs whose actions Amazon believes are responsible for the violations established in our complaint, and to do so proactively in the future to mitigate any further violations.

The brazen nature of Amazon's violations demands swift and serious enforcement action. The Commission should send a message to Amazon and other VPDs that the IP captioning rules are not merely a technical requirement that can be violated with impunity, but rather form the core of the CVAA's recognition that all deaf and hard of hearing Americans have the civil right to access video programming on equal terms. Accordingly, we urge the Commission to immediately refer this matter to the Enforcement Bureau for the prompt imposition of sanctions.

⁶⁹ See *Consumer Groups Complaint* at 1.

Respectfully submitted,



Blake E. Reid

Counsel to TDI

Margarita A. Varona

Georgetown Law Student

Institute for Public Representation

Georgetown Law

600 New Jersey Ave. NW

Washington, DC 20001

202.662.9545

blake.reid@law.georgetown.edu

Cc:

Chairman Julius Genachowski

Commissioner Mignon Clyburn

Commissioner Jessica Rosenworcel

Commissioner Robert McDowell

Commissioner Ajit Pai

Lyle Elder, Office of Chairman Genachowski

Priscilla Argeris, Office of Commissioner Rosenworcel

Dave Grimaldi, Office of Commissioner Clyburn

Erin McGrath, Office of Commissioner McDowell

Matthew Berry, Office of Commissioner Pai

William Lake, Media Bureau

Diana Sokolow, Media Bureau

Jeffrey Neumann, Media Bureau

Kris Monteith, Consumer and Governmental Affairs Bureau

Greg Hlibok, Consumer and Governmental Affairs Bureau

Sharon Bowers, Consumer and Governmental Affairs Bureau

Karen Peltz Strauss, Consumer and Governmental Affairs Bureau

Eliot Greenwald, Consumer and Governmental Affairs Bureau

Rosaline Crawford, Consumer and Governmental Affairs Bureau

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)

Claude Stout, Executive Director • cstout@TDIforAccess.org

Contact: Jim House, Director of Public Relations • jhouse@TDIforAccess.org

8630 Fenton Street, Suite 121, Silver Spring, MD 20910

www.TDIforAccess.org

National Association of the Deaf (NAD)

Howard Rosenblum, Chief Executive Officer • howard.rosenblum@nad.org

Contact: Andrew Phillips, Policy Counsel • andrew.phillips@nad.org

8630 Fenton Street, Suite 820, Silver Spring, MD 20910

301.587.1788

www.nad.org

Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)

Contact: Cheryl Heppner, Vice Chair • CHeppner@nvrc.org

3951 Pender Drive, Suite 130, Fairfax, VA 22030

Association of Late-Deafened Adults (ALDA)

Mary Lou Mistretta, President • aldamarylou@yahoo.com

Contact: Brenda Estes • bestes@endependence.org

8038 Macintosh Lane, Suite 2, Rockford, IL 61107

Hearing Loss Association of America (HLAA)

Brenda Battat, Executive Director • Battat@Hearingloss.org

Contact: Lise Hamlin, Director of Public Policy • LHamlin@Hearingloss.org

7910 Woodmont Avenue, Suite 1200, Bethesda, MD 20814

301.657.2248

www.hearingloss.org

California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH)

Contact: Sheri A. Farinha, Vice Chair • SFarinha@norcalcenter.org

4708 Roseville Rd, Ste. 111, North Highlands, CA 95670

916.349.7500

Cerebral Palsy and Deaf Organization (CPADO)

Contact: Mark Hill, President • deafhill@gmail.com

1219 NE 6th Street #219, Gresham, OR 97030

503.468.1219

CERTIFICATION

Pursuant to 47 C.F.R. § 1.16, I, Dr. Christian Vogler, hereby certify under penalty of perjury that to the extent there are any facts or considerations not already in the public domain which have been relied on in the foregoing document, these facts and considerations are true and correct to the best of my knowledge.

A handwritten signature in black ink that reads "Christian Vogler". The signature is written in a cursive style with a large, stylized 'C' and 'V'.

Dr. Christian Vogler
April 17, 2013

SLCC 1116, Gallaudet University
800 Florida Avenue NE
Washington, DC 20002
202.250.2795
christian.vogler@gallaudet.edu

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on April 17, 2013, a copy of the foregoing complaint was served by first class U.S. mail, postage prepaid, and e-mail upon:

Michael Callahan
Amazon
PO Box 81226
Seattle, WA 98108
mcall@amazon.com
206-266-1000


Niko Perazich
April 17, 2013